Supreme Court, U.S.
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No.

In The
Supreme Court
of the
United States

LYNN ANN KIM,
Petitioner,
vs.
PACIFIC BELL, a Corporation,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Is an action brought pursuant to ERISA section 510 (29 U.S.C. § 1140) most analogous to and thus subject to the statute of limitations for a breach of contract claim or a wrongful termination or employment discrimination--type claim?

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No.

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PETITION FOR WRIT OF CERTIORARI

JURISDICTIONAL GROUNDS FOR PETITION

This Petition for Writ of Certiorari seeks review of an unpublished decision of the United States Court of Appeals for the Ninth Circuit dated May 30, 2001.[1]

This Petition is proper and timely and within the jurisdiction of this court pursuant to Rules of the Supreme Court of the United States, Rule 13.1 and 28 U.S.C. 2101(c).

[1] Lynn Ann Kim v. Pacific Bell, et al., (2001) Ninth Circuit Case Number 99-17258. The decision of the Ninth Circuit is reproduced in Appendix "A" hereto. Specific page references to this Opinion will be designated as "App.1a," "App.2a," and so on.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

29 U.S.C. § 1140 (ERISA § 510) provides, in pertinent part:

> It shall be unlawful for any person to discharge, fine suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this subchapter, section 1201 of this title, or the Welfare and Pension Plans Disclosure Act, or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this subchapter or the Welfare and Pension Plans Disclosure Act. . . . The provision of section 1132 of this title shall be applicable in the enforcement of this section.

STATEMENT OF THE CASE

Statement of Facts

Petitioner Lynn Ann Kim worked for respondent Pacific Bell for almost 26 years, from December 12, 1969 to October 15, 1995. From 1969 to 1977, Kim's conduct, performance and attendance were exemplary and she received numerous commendations, increased job responsibilities and pay raises. In 1977, Kim began working in the Employee Benefits Program handling employees' disability benefits. Kim worked closely with both the General Employees Benefits

Committee and the Claims Review Committee, gaining intimate knowledge of those entities' policies and procedures as well as those of the Disability Assistance Program.

From 1977 to July 1994, Kim performed her duties without significant or noted criticism. In July 1994, Kim was diagnosed with diabetes mellitus and hypothyroidism. She began having memory, concentration and focus problems, sleep disorders, and her ability to drive was compromised. Also in July 1994, Kim's supervisor, Nina Burkert, became abusive, yelling at Kim in front of other people, belittling her medical condition and throwing things on her desk. In November 1994, Kim was diagnosed with major depression.

Kim received commendations for perfect attendance for seven years preceding the onset of her illnesses in 1994. Kim attempted to continue to perform her job despite the debilitation caused by her illnesses. However, Kim's doctors had difficulty adjusting her medications so they were both medically optimal and did not disrupt her job performance.

On December 23, 1994, Kim was late to work because when she awoke she could not move her hands due to sleep paralysis. Burkert sent Kim home because she was late. Due to the stress of this incident, Kim's conditions worsened and her physicians recommended a leave of absence. Kim remained unable to report for work until March 20, 1995.

On January 3, 1995, Kim applied for short-term disability benefits for the period that eventually extended from December 27, 1994 to March 20, 1995. Her application was based on the fact that she was disabled due to complications from diabetes mellitus, hypothyroidism and major depression. Pending Kim's application, she was under the care of doctors who provided defendants with detailed medical evidence as to her illnesses and limitations. These doctors also complied with defendants' requests for additional information. For

example, Kim's application was supported by evidence from her doctors that her illnesses rendered her "disabled and unable to work" for several months. One of Kim's doctors acknowledged that she might not appear ill to a layperson, however, Kim was unable to perform the same level of work as she had for the preceding 25 years.

On March 20, 1995 Kim returned to work, and for the first time since she began working for Pacific Bell, she was placed under the supervision of two persons, Hokey Morgan (Morgan) and Burkert. In her almost 26 years at Pacific Bell, Kim knew of no other employee who was supervised simultaneously by two persons. In addition to Burkert, at this time Morgan and defendants' employee Stephanie Ho (Ho) began to harass Kim. This included intimidation, threats, ridicule of her medical condition, last-minute scheduling changes, and the placement of Kim on a Performance Improvement Plan. ("PIP"). This PIP included additional duties and an increased work load. Based on her 25-plus years of experience with Pacific Bell, Kim understood that the goal of this PIP was to terminate her employment. Kim vigorously disputed the assertion that her performance required improvement.

Kim's January 3, 1995 application for short-term disability benefits was denied four times by Pacific Bell's Disability Assistance Program and General Employee Benefits Committee: on January 6, 1995, February 10, 1995, May 31, 1995 and June 6, 1995.

Based on her intimate familiarity with defendant's Disability Assistance program, General Employee Benefits Committee, and Claims Review Committee, Kim was painfully aware that it would be futile to appeal the fourth denial of her application. Over a span of 19 years, Kim became very familiar with defendants' consistent policy of upholding the

decisions of the Disability Assistance Program and the General Employee Benefits Committee whenever they were appealed. Further, the same supervisors who were harassing Kim (Morgan & Burkert) were members of the General Employee Benefits Committee that was responsible for reviewing short-term disability benefit applications. As such, Kim did not appeal the June 6, 1995 denial.

After defendants refused to grant Kim short-term disability benefits, they placed her on involuntary Company Initiated Leave for a period of December 1994 to March 1995. Placement of an employee on Company Initiated Leave caused him or her to lose employee benefits and service retirement credits for that period, thus Kim lost those benefits for this period.

Kim's partner had a heart attack on June 5, 1995, causing her own condition to deteriorate. On June 6, 1995 Kim's doctor wrote to defendants explaining that her depression was worse and that she would "need some understanding in adjusting her work duties during this period." Defendants made no adjustment to Kim's duties. Due to her continuing disabilities, Kim was unable to report to work from July 13, 1995 to October 16, 1995.

On July 13, 1995, Kim applied for short-term disability benefits for a second time. As with her first application, this one was repeatedly denied even after submitting additional information from her physicians and undergoing physical exams. Kim received seven denials of this claim: on July 14, 1995, August 25, 1995, August 29, 1995, September 14, 1995, October 2, 1995, October 11, 1995 and January 17, 1996.

Defendants again placed Kim on involuntary Company Initiated leave and she lost employee benefits and service retirement credits for the period of July 13, 1995 to October 16, 1995.

At all times while this second claim was pending, Kim was under the care of doctors who provided defendants with detailed medical evidence of her illnesses and the effect they had on her ability to work.

Again based on her intimate familiarity with defendants' entire disability benefits system, coupled with the presence of her supervisors on the General Employee Benefits Committee, Kim knew that it would be futile to appeal the seventh denial of her second application for short-term disability benefits. She did not do so.

On October 16, 1995, Pacific Bell terminated Kim's employment, allegedly because she failed to report to work that day. However, evidence uncovered during discovery revealed that Pacific Bell actually decided to terminate Kim's employment no later than September 28, 1995.

Procedural History

On October 15, 1997, plaintiff/petitioner Lynn Ann Kim filed a complaint against her former employer, Pacific Bell, alleging wrongful termination. The complaint was later amended to add additional defendants and to assert causes of action for violations of the Employee Retirement Income Security Act ("ERISA") (29 U.S.C. §1001, et seq.), including three causes of action for alleged violations of ERISA section 502 (29 U.S.C. §1132) and one cause of action for violation of ERISA section 510 (29 U.S.C. § 1140.) The District Court had federal question jurisdiction pursuant to 29 U.S.C. 1132.

In June 1999 defendants filed a motion for summary judgment, or, in the alternative, summary adjudication. Kim opposed the motion. On August 10, 1999 the district court granted defendants' motion as to the first four causes of action for ERISA violations. The court requested additional briefing

as to the fifth cause of action for wrongful termination.[2] Judgment was entered in favor of the defendants on September 20, 1999 and petitioner appealed to the Ninth Circuit.

In an unpublished decision entered on May 30, 2001, the Ninth Circuit affirmed the district court's orders granting summary judgment, holding, among other things, that petitioner's ERISA section 510 claim was governed by California's one year statute of limitations period applicable to wrongful termination actions. (Calif. Code of Civ. Proc. §340.) Since petitioner's complaint had been filed more than one year after her termination, the Ninth Circuit held the action was untimely and had been properly dismissed.

Petitioner timely filed this Petition for Writ of Certiorari on or before August 28, 2001 pursuant to Rules of the Supreme Court, rule 13.1.

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2 The district court order granting in part defendants' summary judgment motion and requesting further briefing is reproduced in Appendix B hereto. The district court's subsequent order granting defendants' motion for summary judgment as to the remaining cause of action is not reproduced here because it deals only with an issue not raised in this Petition.

ARGUMENT

CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONFLICT AMONG THE CIRCUITS AS TO WHETHER AN ERISA SECTION 510 CLAIM IS MORE ANALOGOUS, FOR STATUTE OF LIMITATIONS PURPOSES, TO A WRONGFUL TERMINATION OR EMPLOYMENT DISCRIMINATION-TYPE ACTION OR TO A CONTRACT ACTION

ERISA section 510 does not contain a statute of limitations. Therefore, the courts must look to the most analogous state law limitations period to determine the correct limitations period, keeping in mind this court's admonition that "analogous state statutes of limitation are to be used unless they frustrate or significantly interfere with federal policies." *Reed v. United Transportation Union* 488 U.S. 319, 327, 109 S.Ct. 621, 627, 102 L.Ed.2d 665 (1989); *see also DelCostello* v. *Teamsters* 462 U.S. 151, 103 S.CT. 2281, 76 L.Ed.2d 476 (1983); *Felton* v. *Unisource Corporation* 940 F.2d 503, 510 (9th Cir. 1991). In determining which state statute of limitations is most appropriate, the courts must "characterize the essence of the claim in the pending case." *Wilson* v. *Garcia* 471 U.S. 261, 268, 105 S.CT. 1938, 1942, 85 L.Ed.2d 254 (1985).

The question of what statute of limitations applies to an action by an employee against her employer to redress violations of section 510 of ERISA is the subject of conflict in the federal courts. As the Ninth Circuit recognized in *Felton* v. *Unisource Corporation, supra,* 940 F.2d 503 when considering the issue for the first time, "the other circuits and district courts that have considered this issue have reached a variety of results." *Id.*, at 511. Most recently, the Second Circuit,

reviewing the same issue, noted that "the circuit courts have reached disparate conclusions." *Sandberg* v. *KPMG Peat Marwick, LLP* 111 F.3d 331 (2nd Cir. 1997).

The Ninth Circuit in *Felton* went on to discuss this variety of results, ultimately agreeing with those courts which have found that a claim brought under section 510 is essentially an assertion that the employee was discriminated against based on either his application for insurance benefits or his pension eligibility and found such a claim most closely analogous to state claims for wrongful termination against public policy or retaliatory discharge. *Felton, supra,* p. 512. Because California's statute of limitations for wrongful termination is one year, (Calif. Code of Civ. Proc., § 340) and the petitioner herein filed her action more than one year after her termination, the Ninth Circuit, following *Felton,* affirmed the District Court's finding that the action was untimely. However, had the Ninth Circuit agreed with other circuits which have held that an ERISA section 510 claim is more analogous to a contract action, the result would have been entirely different, since petitioner did file her action within the four year limitation period permitted in California for contract actions. (Calif. Code of Civil Procedure, section 337)

As will be shown, the conflict between the circuits and the district courts as to what statute of limitations to apply to section 510 claims is deep and fractured. Several courts have held, like the Ninth Circuit, that the claim is essentially akin to a state claim for wrongful termination or retaliatory discharge. See, for example, *Sandberg* v. *KPMG Pet Marwick, LLP* 111 F.3d 331, 335 (2nd Cir. 1997) (section 510 claim analogous to retaliatory discharge or wrongful termination cause of action); *Teumer* v. *General Motors Corp.* 34 F.3d 542 (7th Cir. 1994) (section 510 action most akin to retaliatory discharge action). Others have defined a section 510 action as more analogous to

a claim for employment discrimination. See, for example, *Held* v. *Manufacturers Hanover Leasing Corp.* 912 F.2d 1197, 1205 (10th Cir. 1990) (employee's claim for injunctive relief under section 510 of ERISA is most analogous to an employment discrimination claim); *Gavalik* v. *Continental Can Co.* 812 F.2d 834, 843 (3rd Cir. 1987) *cert. denied* 484 U.S. 979, 108 S.Ct. 495, 98 L.Ed.2d 492 (1987) (plaintiff's section 510 claims most analogous to employment discrimination claim and same limitations period should apply.). In *McClure* v. *Zoecon, Inc.* 936 F.2d 777 (5th Cir. 1991) the court held a section 510 action is most similar to a wrongful discharge or employment discrimination claim.

However, other courts have reached entirely different results. In *Heideman* v. *PFL, Inc.* 904 F.2d 1262, 1267 (8th Cir. 1990), *cert. denied* 498 U.S. 1026, 111 S.Ct. 676, 112 L.Ed.2d 668 (1991), the Eighth Circuit held that a section 510 claim under ERISA is governed by the state's contract statute of limitations. Taking a slightly different approach, the Eleventh Circuit, applying Georgia law, held that section 510 claims are based on contract, but that ERISA is a statutory right which is governed by the state statute of limitations applicable to claims based on violations of statutory rights. *Clark* v. *Coats & Clark, Inc.* 865 F.2d 1237, 1242 (11th Cir., 1989)[3] Similarly, in *Gladich* v. *Navistar International Transportation Corp.* 703 F.Supp. 1331, 1333 (N.D. Ill. 1989), the court rejected the notion that a section 510 claim is primarily based on discrimination, concluding instead that the essence of the claim is for employment injury

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[3] However, the same court, applying Florida law, held in *Byrd* v. *MacPapers, Inc.* 961 F.2d 157 (11th Cir., 1992), that the essential nature of a section 510 claim is that of a suit for benefits denied by wrongful discharge which was most analogous to Florida's two-years limitation period to recover wages or damages concerning payment of wages.

subject to the residual statute for "all civil actions not otherwise provided for." *Cowden* v. *Montgomery Co. Soc. For Cancer Control* 591 F.Supp.740, 755 (S.D. Ohio 1984) also concluded that ERISA is a statutory right. In contrast to these findings, the Ninth Circuit has expressly rejected as circular reasoning, the concept that an ERISA cause of action is most analogous to a statutory claim because ERISA is a statute. *Felton, supra,* 940 F.2d at 512.

It is also noteworthy that there is dissension on this issue even within some circuits. Although the majority in *McClure* v. *Zoecon, Inc., supra,* 936 F.2d 777 held that a section 510 action is most similar to a wrongful discharge or employment discrimination claim, the majority decision was met with a vigorous dissent by Judge Thornberry. The dissent noted that several courts have defined an employee's right to recover ERISA benefits without interference from his employer as a contractual right and argued that the fact that an employer may selectively breach a contract with one employee rather than another may be described as "discrimination" but it does not change the essence of the cause of action resulting from that breach to a tort. Judge Thornberry concluded that the focus must remain on the rights and duties involved, rather than the action of the parties, and, pursuant to this approach, he would follow the decisions of the Eleventh and Eighth Circuits in classifying a section 510 action as a contract action for purposes of applying a statute of limitations. (*McClure*, at 780.)

In addition to the differences in the lower courts' ultimate conclusions regarding what type of statute to "borrow" for purposes of determining the limitations period in a section 510 action, it is significant that the courts' underlying rationale also demonstrates wide fissures. For example, in *Felton*, the Ninth Circuit commented that "[a]s the

district court did here, most courts have found that a claim under § 510 addresses an economic injury, not a personal one. See, e.g., *Gladdich*, 703 F.Supp. At 1333. We do not find that the district court erred in this characterization." *Felton*, at 512. Nevertheless, after expressly agreeing that a section 510 claim is primarily an economic claim, the Ninth Circuit went on to conclude that the most analogous state law claim is wrongful termination against public policy or retaliatory discharge. (*Ibid.*) This conclusion appears to conflict with the conclusion reached by a California appellate court in *Barton* v. *New United Motor Manufacturing, Inc. (1996)* 43 Cal.App.4th 1200, 51 Cal. Rptr.2d 328: That case states:

> . . . the essential nature of the [wrongful termination] action is the protection of certain *personal rights* deemed to be of fundamental public importance, not the protection of property rights. . . [T]he gravamen of the wrongful termination action is the violation of some *personal right* considered to be of fundamental public importance, protected or guaranteed either by statute or the Constitution, not the *financial or economic loss* from the termination of employment. *Id.*, at 1208-1209. [emph. added.]

Moreover, the court in *Clark* v. *Coats & Clark, Inc.* 865 F.2d 1237 concluded, like the Ninth Circuit, that a section 510 claim is an economic injury, but, unlike the Ninth Circuit, concluded that such an economic injury is most closely analogous to a contract action. The *Clark* court held that a section 510 claim:

> . . . does not encompass *individual or personal rights*. The primary purpose of ERISA is to provide adequate retirement income to persons who have spent their careers in a productive work capacity. These rights cannot be regarded as anything other than *economic* and to characterize their violation as *'personal injuries'* would be a distortion of language. [emph. added.]

Thus, while the Ninth Circuit in *Felton* and the Eleventh Circuit in *Clark* both agree that section 510 primarily protects an economic right, rather than a personal right, they nevertheless reach opposition conclusions as to which type of state statute is most analogous: the Ninth Circuit concludes the economic injury described in a section 510 claim is most similar to a wrongful termination claim, and the Eleventh concludes it is most like a contract claim. In contrast, the California appellate court in *Barton* concludes that the essential nature of a wrongful termination action is the protection of *personal rights* rather than economic rights. This conclusion appears to be in direct contravention to the Ninth Circuit's conclusion that section 510 is most similar to a wrongful termination action but primarily protects an economic right.

In short, the federal courts are deeply conflicted as to the ultimate conclusions they reach as to which statute of limitations to apply to section 510 actions as well as to the rationale upon which these conclusions are based.

CONCLUSION

As the Seventh Circuit has acknowledged, the question of what type of state claims are most analogous to ERISA section 510 claims for purposes of determining the appropriate statutes of limitations is an "important question." *Tolle* v. *Carroll Touch, Inc.* 977 F.2d 1129, 1138 (7th Cir. 1992). Unless this court grants certiorari, this important question will continue to be answered in a variety of ways by the lower courts. The result will be that some litigants, like petitioner here, may be bound to a one year limitations period in which to assert her claims, while litigants in a neighboring state may be permitted to wait many more years to assert a similar claim. The result is inequitable and in contravention to the overriding goal of ERISA to protect employees and their rights to benefits. Accordingly, this Court is respectfully requested to grant this Petition to settle this important and far-reaching question of law.

Respectfully submitted,

DATED: August 27, 2001

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

MAY 30 2001
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CLERK
U.S. COURT OF APPEALS

LYNN ANN KIM,	)	No. 99-17258
Plaintiff-Appellant,	)	D.C. No. CV 97-4591 SI
	)	
v.	)	MEMORANDUM*
	)	
PACIFIC BELL; PACIFIC TELESIS GROUP COMPREHENSIVE DISABILITY BENEFITS PLAN; GENERAL EMPLOYEES' BENEFITS COMMITTEE,	)	
	)	
Defendants-Appellees.	)	

Appeal from the United States District Court
for the Northern District of California
Susan Y. Illston, District Judge, Presiding

Argued and Submitted May 15, 2001
San Francisco, California

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit, except as may be provided by Ninth Cir. R. 36-3.

Before: O'SCANNLAIN, TASHIMA, and THOMAS, Circuit Judges.

Appellant raises two issues on appeal. First, she claims that the district court erred in finding that she failed to show futility of exhaustion on her ERISA § 502 claims. We review that decision for an abuse of discretion. See Diaz v. United Agric. Employee Welfare Benefit Plan & Trust, 50 F.3d 1478, 1483 (9th Cir. 1995) (citing Amato v. Bernard, 618 F.2d 559, 569 (9th Cir. 1980)). Under that standard of review, "this court cannot reverse the district court's ruling unless it has a definite and firm conviction that the lower court committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors." Marx v. Loral Corp., 87 F.3d 1049, 1054 (9th Cir. 1996).

Although we understand and appreciate Appellant's arguments, upon a review of the record, we cannot conclude that the district court committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors. See id. On the contrary, the district court analyzed the undisputed evidence presented and decided, based on existing authority, that Appellant had failed to show that she was entitled to invoke the futility exception. That decision was well-reasoned and we will not disturb it on appeal.

Appellant also contends that the district court erred in concluding that California's four-year statute of limitations for contract actions did not apply to her § 510 claim. We review the district court's ruling de novo. See United States ex rel. Lujan v. Hughes Aircraft Co., 162 F.3d 1027, 1034 (9th Cir. 1998).

Because § 510 does not contain a statute of limitations, we look to the most analogous state-law limitations period. Id.

> In Felton, we recognized that "a claim brought under § 510 is essentially an assertion that the employee was discriminated against based on either his application for insurance benefits or his pension eligibility." We then held that "the most analogous state law claim would be wrongful termination against public policy or retaliatory discharge."

Burrey v. Pac. Gas & Elec. Co., 159 F.3d 388, 396 (9th Cir. 1998) (internal citations omitted) (quoting Felton v. Unisource Corp., 940 F.2d 503, 512 (9th Cir. 1991)). Our decision in Wetzel v. Lou Ehlers Cadillac Group Long Term Disability Ins. Program, 222 F.3d 643, 648 (9th Cir. 2000) (en banc), which analyzed the most analogous statute of limitations for a § 502 claim, does not alter this analysis. Accordingly, the district court did not err in concluding that Appellant's §510 claim is time-barred.

AFFIRMED.

FILED
AUG 10 1999
RICHARD W. WIEKING
CLERK U.S. DISTRICT COURT
NORTHERN DISTRICT OF
CALIFORNIA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

LYNN ANN KIM, Plaintiff-Appellant, v. PACIFIC BELL; PACIFIC TELESIS GROUP COMPREHENSIVE DISABILITY BENEFITS PLAN; GENERAL EMPLOYEES' BENEFITS COMMITTEE, Defendants-Appellees.	)	No. C-97-04591 SI ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT IN PART AND REQUESTING FURTHER BRIEFING

On July 23,1999, the Court heard oral argument on defendants' motion for summary judgment, or in the alternative, summary adjudication. Having carefully considered the arguments made and the papers submitted, the Court GRANTS defendants' motion for summary judgment as to plaintiff's first, second, third, and fourth causes of action. The Court also requests further briefing and submission of materials as to plaintiffs fifth cause of action.

BACKGROUND

Plaintiff Lynn Ann Kim ("Kim") worked for defendant Pacific Bell from December 12, 1969, until October 16, 1995. In 1977, Kim began working in Pacific Bell's Employees Benefits Programs department. Her responsibilities included addressing medical, dental, disability, and worker's compensation benefits for Pacific Bell employees. As part of her duties, Kim worked closely with the General Employees Benefits Committee ("GEBC") and the Claims Review Committee ("CRC"), and had knowledge of those entities' policies and procedures. Kim Decl. ¶29. From 1977 until July 1994, Kim performed her duties without significant or noted criticism. Kim Decl. ¶30.

During the time period relevant to this action, Kim worked as a supervisor's assistant in Pacific Bell's Pension Administration department. Kim Depo., 11:12-24, Bolden Decl, Ex. 1.[1] In late December 1993 or early January 1994, Kim was assigned to work under the supervision of Nina Burkert ("Burkert"). Kim Depo., 11:1-4. In July 1994, Kim was diagnosed with diabetes mellitus and hypothyroidism. Kim Decl., ¶3:26-27. In November 1994, Kim was diagnosed with major depression. Kim Decl., ¶13:28.

Burkert believed that Kim's work in 1994 was of poor quality, and complained that Kim failed to meet deadlines and produced a low volume of work. Kim Depo., 22:9-15, 23:5-25, 24:18-25:5. In December 1994, Burkert drafted a performance review assessing Kim's work in 1994, which stated that Burkert found Kim's work to fall below Pacific Bell standards. Kim Depo., 103:9-105:12.

Kim was absent from work from December 27, 1994,

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[1] For purposes of simplicity, all future cites to Kim's deposition are located at Exhibit 1 of the Bolden Declaration.

until March 20, 1995, due to her illnesses. Kim Depo., 52:19-21, 57:21-23. In early 1995, Kim applied for Short Term Disability ("STD") benefits for this absence. Kim Depo., 57:17-23. On January 6, 1995, defendant's Disability Assistance Program ("DAP") informed Kim by letter that STD benefits had not been authorized, but that Kim could provide additional medical information for further review. Kim Depo., 62:1-5, 63:14-64:6; Kim Decl., Ex. 1. Kim was then placed on Company Initiated Leave ("CIL"). Kim Depo., 76:21-77:3; 78:7-9; 78:19-21.

Dr. Hersch, a Pacific Bell psychologist, examined Kim on January 31, 1995, and found no evidence of any emotional impairment. Dr. Hersch determined that Kim was able to work. Kim Depo., 68:2-11; Bolden Decl. Ex. 2. On February 10, the DAP informed Kim by letter that it had denied STD benefits on the basis that "there is insufficient evidence that you are unable to perform the work that your department has provided you," and that this denial would now be submitted to the GEBC for review. Kim Decl., Ex. 2. On February 16, 1995, Dr. Mendleson wrote a letter to Joanne Syvertsen, a DAP representative, indicating that Kim was suffering from severe depression caused by caring for her severely ill boyfriend, and was dizzy and disoriented from her illnesses. Kim Depo., 74:4-20; Kim Decl., in her opinion Kim was incapable of working at that time due to her mental condition. Kim Decl, ¶8, Ex. 4.

Kim returned to work on March 20, 1995. Kim Depo., 57:21-23. Upon her return, Kim was told she would now be under the joint supervision of Burkert and Hokey Morgan ("Morgan"). Kim Depo., 10:19-25,11:5-11. Kim was now shown the performance review Burkert had drafted in December 1994. Kim Depo., 104:1-5. Kim refused to sign the review and disagreed with Burkert's negative assessment of her work. Kim Depo., 104:15-17; Kim Decl., ¶4. On April 25, 1995, Morgan and Burkert placed Kim on a Performance

Improvement Program ("Improvement Program"). Kim Depo., 108:12-15, 1 109:11-110:8; Kim Decl, ¶10. See also Morgan Decl. ¶3. The Improvement Program was to last ninety days, and focused on improving Kim's performance in her key responsibilities. The Improvement Program set out Kim's duties in great detail, including training schedules and deadlines. All of the projects were familiar to Kim, since she had performed these types of duties for the past few years, though the volume of work was slightly increased. Kim was also expected to comply with Pacific Bell's attendance policy. Kim Depo., 111 :7-13, 112:13-23, 112:23-114:23; Kim Decl. ¶10. Kim understood that there would be consequences for failing to improve her performance. If within thirty days her performance had not improved, she would receive a warning of suspension; after sixty days without improvement, she would be suspended; and after ninety days without improvement, she could potentially be terminated. Kim Depo., 110:9-112:12. Kim met weekly with Morgan to discuss her progress on the Improvement Program and any issues she might need help resolving. Kim Depo., 119:5-16, 154:20-23.

Around May 31, 1995, the GEBC notified Kim that it had ratified the DAP's decision to deny her application for STD benefits for the period of January through March, 1995. Kim Depo., 184:2-14; Ex. 5. Kim was notified of and understood the appeals process, but chose not to appeal the decision. Kim Depo., 58:21-59:1, 185:21-186:21.

On May 31, 1995, Morgan met with Kim and told her that her performance had not sufficiently improved, and that she was now receiving a warning of suspension. If her performance did not improve within thirty days, she would be suspended. Kim Depo., 122:16-123:4, 124:25. Morgan told Kim that she could call a help-line for technical assistance with word processing, but Kim chose not to do so. Kim Depo.,

120:4-121:24.

On June 28, 1995, Burkert and Marianne Lonsdale ("Lonsdale"), Burkert's supervisor, met with Kim. They told Kim that she had not met several standards on her Improvement Program, including timeliness of work. Kim Depo., 167:12-169:19. Burkert and Lonsdale then suspended Kim for three days, June 29, June 30, and July 5, in accordance with the Improvement Program's strictures. Kim Depo., 169:20-170:15. Kim was required to turn in her identification badge when she was suspended. Kim Depo, 169:22-170:9.

At the end of the suspension, Kim called Burkert and told her that she would not be returning to work for health reasons. Kim then applied for STD benefits. Kim Depo., 176:25-177:2, 187:7-10. Dr. Kimmerling, Kim's physician, informed the DAP that he expected Kim to be able to return to work on September 15, 1995. Davis Decl, ¶7. After initially not authorizing STD benefits, but while still investigating Kim's application, defendants placed Kim on a second period of CIL, effective July 13, 1995.

In a letter dated September 20, 1995, Pacific Bell requested Kim to return to work on September 27, 1995. Kim Depo., 204:13-21. Kim did not return to work on that date. Kim's treating psychiatrist, Dr. Quan-Holden, wrote a letter to the DAP, stating that Kim was unable to work at the time, and would never be able to work again at any job requiring "concentration, memory, pressure, or thinking." Davis Decl. H 8, Ex. 3. Pacific Bell then sent Kim a letter requesting that she return to work on October 16, 1995, or be terminated. Kim Depo., 210:19-25.

The DAP referred Kim to Dr. Wong, a medical consultant, to establish whether Kim's medical condition

would prevent her from working without restrictions.[2] Kim Depo., 202:10-203:2, Ex. 27. The DAP then referred Kim to Dr. Hersch, who found Kim able to work. Bolden Decl., Ex. 2. Kim did not return to work on October 16, and was terminated the same day. Kim Depo., 213:5-8; Ex. 32.

On September 14, 1995, the DAP notified Kim by letter that it had denied STD benefits after a review of the medical evidence in its possession, and that the denial would now be sent to the GEBC for review. Kim Depo., 177:3-4, 197:5-7, 207:24-208:3; Kim Decl, Ex. 10. On January 17, 1996, the GEBC informed Kim that it had ratified the DAP's decision to deny STD benefits for her July 1995 application. The letter set forth the process by which Kim could appeal the GEBC's decision. Kim Depo., 219:25-220:18; Ex. 34. Kim was aware of the procedure, because she had worked within the benefits and pension administration department. Kim Depo., 29:2-59:7. Kim did not appeal the denial of benefits. She believed that any appeal would be pointless, because she thought the CRC, to which the appeal would be made, rarely overrode GEBC decisions, and because her managers were members of the GEBC. Kim Depo., 216:20-25.

Kim filed her Original Complaint in state court on October 15, 1997. Defendants removed the action to this Court on December 17, 1997, based on federal subject matter jurisdiction. Kim then filed her First Amended Complaint on September 8, 1998, alleging five causes of action. The first and second claims allege defendants Plan and Administrator violated § 502 of the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended, 29 U.S.C. § 1001 et seq., by wrongfully denying Kim short-term disability benefits under

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[2] Neither Kim nor defendants have supplied the Court with medical reports from Dr. Wong.

an ERISA plan. The third cause of action alleges defendants Plan and Administrator violated ERISA § 502 by assisting in wrongfully denying Kim service retirement credits] under an ERISA plan. The fourth cause of action alleges defendants Pacific Bell and the DAP violated ERISA § 510 by wrongfully interfering with Kim's ERISA-protected rights. Finally, the fifth cause of action asserts a state claim for wrongful termination of employment in breach of an oral and written contract.

Defendants move for summary judgment on all counts, or, in the alternative, for summary adjudication.

STANDARD OF REVIEW

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 2553 (1986). The moving party, however, has no burden to negate or disprove matters on which the non-moving party will have the burden of proof at trial. The moving party need point out to the Court that there is an absence of evidence to support the non-moving party's Celotex, 477 U.S. at 325, 106 S. Ct. at 2554.

The burden then shifts to the non-moving party to "designate 'specific facts showing that there " is a genuine issue for trial."' Id. at 324, 106 S. Ct. at 2553 (quoting Rule 56(e)). To carry this burden, the non-moving party must "do more than simply show that there is some metaphysical doubt

as to the material facts." Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 [S. Ct. 1348, 1356 (1986). "The mere existence of a scintilla of evidence . . . will be insufficient; there must be evidence on which the jury could reasonably find for the [non-moving party]." Anderson v. [Liberty Lobby, Inc., 477 U.S. 242, 252, 106 S. Ct. 2505, 2519 (1986).

In deciding a motion for summary judgment, the evidence is viewed in the light most favorable to the non-moving party, and all justifiable inferences are to be drawn in its favor. Anderson, 477 U.S. at 255, 106 S. Ct. at 2513. "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge [when she] is ruling on a [motion for summary judgment." Id.

DISCUSSION

1. First and second Causes of Action for violations of ERISA § 502.

Kim's first cause of action alleges that defendants Plan and Administrator violated ERISA § 502 by abusing their discretion when denying Kim's application for STD benefits for the January-March 1995 period. Her second cause of action alleges defendants also abused their discretion when denying Kim's application for STD benefits for the period beginning in July 1995.

Defendants argue they are entitled to summary judgment on Kim's first and second claims because Kim did not exhaust the administrative remedies available under the Plan. Defendants point out that while ERISA itself contains no explicit exhaustion requirement, federal courts have consistently held that plaintiffs must exhaust all potential

administrative avenues of relief before filing ERISA suits.[3]

Kim responds that she did not appeal the denials of her STD claims because to do so would have been futile. She contends her failure to exhaust the Plan's administrative remedies should therefore be excused under the futility exception to the exhaustion rule.

Under the Plan's guidelines, the power to approve or deny claims for STD benefits has been delegated to the DAP and the GEBC. The DAP has authority to refer claimants to Company physicians in the process of determining claimants' medical status. The DAP may request more information from the claimant while evaluating a claim, but the only time an STD application is denied is when the DAP notifies a claimant that it will seek to have its denial ratified by the GEBC. The DAP's decisions are then ratified or overturned by the GEBC. If the GEBC ratifies the DAP's decision to deny a claim, the claimant then has the option to appeal to the CRC within sixty days. Maley Decl., ¶7-9.

Kim has testified that she was aware of the appeals process, by virtue of both having worked within the benefits department, and having been specifically informed by the GEBC in its notifications of denial. She chose not to appeal either denial, because she felt that it would be futile to do so. According to Kim, she had rarely observed successful appeals while working in the benefits department. She also believed

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[3] Defendants also argue that Kim's first cause of action exceeds the statute of limitations, as the First Amended Complaint was not timely filed for that claim. Defendants then contend that the First Amended Complaint cannot be construed to relate back to the Original Complaint. In light of Kim's pro per status at the time she filed her Original Complaint, the Court is skeptical of defendants' arguments against relation back; however, since summary judgment will be granted on other grounds, the Court need not reach the statute of limitations argument.

that her supervisors were united against her and she would not receive a fair review from the appeals committee.

To promote judicial efficiency and effective ERISA litigation, courts have generally required that plaintiffs exhaust their administrative remedies under ERISA plans before filing lawsuits. "Quite early in ERISA's history, we announced as the general rule governing ERISA claims that a claimant must avail himself or herself of a plan's own internal review procedures before bringing suit in federal court." Diaz v. United Agricultural Employee Welfare Benefit Plan and Trust, 50 F.3d 1478, 1483 (9th Cir. 1995) [(referring to the holding of Amato v. Bernard, 618 F.2d 559, 568 (9th Cir. 1980)). To overcome the exhaustion requirement, a plaintiff may show that to follow a given appeals process would have been futile. To demonstrate futility, a plaintiff must show more than distrust or unwillingness to proceed with the administrative remedy. "[I]n order to come under the futility exception to the exhaustion argument, a plaintiff must show that 'it is certain that [her] claim will be denied on appeal, not merely that [she] doubts that an appeal will result in a different decision.'" Ames v. American National Can Co., 170 F.3d 751, 756 (7th Cir. 1998) (quoting Smith v. Blue Cross & Blue Shield United of Wis., 959 F.2d 655, 659 (7th Cir. 1992)). In other words, the administrative review must have been "demonstrably doomed to fail" for a plaintiff to be excused from the exhaustion requirement. Diaz. 50 F.3d at 1485.

Kim has not demonstrated that the Plan's appeals process meets this high standard futility. While she has testified as to her *belief* that the appeals process would have been futile, simple distrust of the process is insufficient, and "bare assertions of futility" will not exempt a plaintiff from exhausting administrative remedies. Id. Instead, Kim makes the circular argument that "defendants have demonstrated by

their continued refusal to pay that they have no intention of doing do." Id. Kim argues that her first and second applications for STD benefits were denied a total of four and seven times, respectively, and that such a large number of denials warranted her belief that further appeals would be futile. However, the Court agrees with defendants that Kim has misconstrued DAP correspondence and business records as additional denials. Each claim was officially denied once by the DAP and then ratified by the GEBC, in keeping with the Plan's procedure. Two denials per application does not assure a "certain" denial by the appeals committee. Ames, 170 F.3d at 756. Kim also contends that some of her supervisors served on the CRC, and their presence made an appeal to the CRC futile. This will still not meet the standard for certain futility: "the fact that the . . . defendants would be the people reviewing the plaintiffs' administrative appeals is not enough to relieve plan participants of the duty to exhaust remedies." Id.

Kim has not demonstrated that appeals of the GEBC's decisions were "demonstrably doomed to fail." Diaz, 50 F.3d at 1485. Accordingly, summary judgment is GRANTED as to her first and second causes of action, for violations of ERISA § 502 by the Plan and Administrator in denying STD benefits.

2. Third Cause of Action for violation of ERISA § 502 by Plan and Administrator.

In her third cause of action Kim alleges the Plan and Administrator violated ERISA § 502 by acting in concert with Pacific Bell to bring about Kim's termination and subsequent loss of service retirement credits. Kim alleges that the Plan and Administrator's original abuse of discretion in denying her STD claims contributed to her eventual termination, and therefore that abuse of discretion extends to the loss of service retirement credits.

As explained above, Kim has admitted that she failed

to exhaust her administrative remedies under the Plan when she chose not to appeal the denials of STD benefits. This failure to exhaust prevents her from bringing a claim that the Plan abused its discretion in denying STD benefits. If Kim cannot bring an action for that alleged abuse of discretion, then she logically cannot bring an action for a later effect of that abuse of discretion, and so Kim's third cause of action must also be barred by the failure to exhaust administrative remedies. Accordingly, summary judgment must be GRANTED as to Kim's third cause of action.[4]

3. **Violation of ERISA § 510.**

In her fourth cause of action, Kim alleges Pacific Bell and the DAP violated ERISA § 510 by interfering with Kim's ERISA-protected rights. Kim alleges, inter alia, that Pacific Bell and the DAP acted to ensure that Kim did not receive favorable consideration of her STD applications and to curtail Kim's rights to continued service retirement credits.

Defendants argue that Kim's claim is barred by the statute of limitations. Defendants contend that the established statute of limitations period for ERISA § 510 claims is one year, and that the statute began to accrue on October 16,1995, the date of her termination. Since Kim filed her ERISA § 510 complaint 1 on September 8, 1998, defendants argue the claim exceeds the statute of limitations.

Kim argues that the appropriate statute of limitations

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[4] Kim offers in her Opposition papers to amend her third cause of action to an ERISA § 510 claim for wrongful interference in her ERISA-protected rights. However, as explained below, the statute of limitations for a § 510 claim is one year, and so any new § 510 claim will exceed the statute. Nor will the relation-back doctrine permit the amendment to survive, as even the Original Complaint was filed more than one year after Kim's termination.

period for her claim should be four years, following the California four-year period for written contract claims. Cal. Code. Civ. Pro. § 337. Kim contends that because her claim arises from interference with her ERISA-protected rights to service retirement credits under the Pension Plan, which is a written document, contract law is the appropriate analogy. If the statute of limitations period is four years, then Kim's claim would be timely.

Because ERISA's civil enforcement section does not provide its own statute of limitations, courts must determine the applicable limitation period by applying the most analogous state law limitations period. See Felton v. Unisource Corp., 940 F.2d 503, 510 (9th Cir. 1991). The Ninth Circuit found in Felton that "a claim brought under § 510 is essentially an assertion that the employee was discriminated against based on either his application for insurance benefits or his pension eligibility," and that therefore "the most analogous state law claim would be wrongful termination against public policy or retaliatory discharge." Id. at 512. In California, the statute of limitations period for wrongful termination against public policy is one year. Cal. Code. Civ. Pro. §340(3). Accordingly, the appropriate statute of limitations period for ERISA § 510 claims is also one year. See Burrey v. Pacific Gas & Electric Co., 159 F.3d 388, 396 (9th Cir. 1998); accord Barton v. New United Motor Mfg., Inc., 43 Cal. App. 4th 1200 (1996).

Kim was terminated from her position at Pacific Bell on October 16, 1995, but did not file her ERISA § 510 claim until September 8, 1998, nearly two years after the statute of limitations had expired on October 16, 1996. Her ERISA § 510 claim is therefore untimely, and summary judgment must be GRANTED.

4. Breach of implied contract not to terminate without good cause.

Kim's final cause of action alleges that Pacific Bell breached an implied contract not to terminate her without good cause. Kim argues that the "totality of circumstances" surrounding her employment, including defendants' "personnel policies and procedures," gave rise to the implied contract, and that her termination on October 16, 1995 was without good cause and accordingly a breach of that contract.

Defendants argue that the claim exceeds the statute of limitations. They contend that the appropriate statutory period is two years for an oral or implied contract, and that since Kim did not file her First Amended Complaint until September 8,1998, after a termination on October 16, 1995, the claim is untimely. Kim first responds that if the two-year period is applied, her claim for breach of contract from the First Amended Complaint should relate back to the Original Complaint, which was filed on October 15, 1997. If Kim's breach of contract claim does relate back to the Original Complaint, then it would fall within the two-year statutory period. Kim then argues that the appropriate statute of limitations is actually four years, since she has alleged violation of an oral and written contract, and the period for a written contract is four years under California law.

a. Relation back.

Kim first argues that if the two-year statute of limitations applies, her claim should survive the statute under the doctrine of relation back. She contends that her claim for breach of contract relates back to her Original Complaint, because the Original Complaint provided defendants with adequate notice of a potential claim for breach of the contract not to terminate without good cause. Federal Rule of Civil

Procedure 15(c) states that "[a]n amendment of a pleading relates back to the date of the original pleading when . . . the claim or defense asserted in the amended pleadings arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." F.R.C.P. 15(c). To meet this requirement, the original and amended complaints must be based on "a common core of operative facts." Martell v. Trilogy, Ltd., 872 F.2d 322, 325 (9th Cir. 1989).

Defendants respond that Kim's First Amended Complaint cannot relate back to her Original Complaint, because the two complaints allege causes of actions based on fundamentally different operative facts.

Kim's Original Complaint was also for breach of contract, but the contract sued upon was the Plan, and the alleged breach by Pacific Bell was the denial of STD benefits. The breach of contract claim in the First Amended Complaint is based on an implied contract not to terminate without good cause, and the alleged breach was Kim's termination. These claims are not based on a common core of operative facts, as they are not even based on the same contract. Kim herself strenuously argued this distinction in her opposition to defendants' earlier motion to strike a request for jury trial. Kim argued,

> [w]hen reviewing the original complaint...even the most liberal of constructionists cannot glean a set of facts that is identical to, or reasonably deduce a theory of recovery that is duplicated in, [Kim's] First Amended Complaint. There are no factual allegations in the original complaint which can reasonably support . . . breach of an employment contract.

Plaintiffs Opposition to Defendants' Motion to Dismiss, 5:11-15. In rejecting defendants' motion to strike Kim's jury

demand, the Court agreed with Kim's position, stating "[t]he claims in the original complaint and the claim for wrongful termination/breach of contract in the [First Amended Complaint] are unrelated, and the matrix of facts underlying the two claims are largely distinct." Order Denying Motion to Dismiss and Denying Motion to Strike Jury Demand, 8:13-14.

The Court must agree with the previous analysis. As the facts underlying the Original Complaint and First Amended Complaint are not the same, relation back is inapposite. If the appropriate statutory period is two years, then, Kim's claim for breach of contract would be barred by the statute of limitations.

b. Applicability of the four-year statutory period.

Defendants argue that because Kim has alleged an implied contract, the appropriate statutory period is two years, under California Code of Civil Procedure § 339. Kim responds that she has alleged the breach of an oral and written contract, and that under the reasoning of Amen v. Merced County Title Co., 58 Cal. 2d 528 (1962), the appropriate statute of limitations should be four years, under California Code of Civil Procedure § 337.

In Amen, the court held that implied promises arising out of written agreements or writings that memorialize express oral agreements fall under the four year statutory period. Kim has produced no written agreement or writing that memorializes an express oral agreement, though she alleges that such documents do exist. The Court is unable to determine the applicability of the Amen rule without examining the alleged written materials, to ascertain whether they may properly serve as the foundation for an implied contract not to terminate without good cause. Without

production of these written documents, the appropriate statutory period cannot be determined. The Court therefore DEFERS ruling on defendants' motion for summary adjudication as to Kim's breach of contract claim, until such time as the parties submit further briefing on the applicability of the Amen rule, and Kim submits the alleged written materials.

CONCLUSION

For the foregoing reasons, defendants' motion for summary judgment is GRANTED with respect to Kim's first four claims for violations of ERISA § 502 and § 510. As to the fifth claim for breach of contract, the Court DEFERS judgment on defendants' motion for summary adjudication until the parties submit to the Court further briefing on the issue of the appropriate statutory period for the breach of contract claim. Kim shall submit her supplementary brief fourteen days from the date of this order. Kim shall also submit the written materials she alleges form the foundation for her implied contract not to terminate in good cause. Defendants shall respond with their supplementary brief seven days after submission of Kim's supplementary brief. As the Court is deferring judgment on Kim's fifth cause of action, it accordingly does not yet reach defendants' motion to strike Kim's request for punitive damages.

IT IS SO ORDERED.

Dated: 8/10/99

s/_____
SUSAN ILLSTON
United States District Judge

Supreme Court, U.S.
FILED
SEP 27 2001
OFFICE OF THE CLERK

(2)

No. 01-380

In the Supreme Court of the United States

LYNN ANN KIM,

Petitioner,

v.

PACIFIC BELL, A CORPORATION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this Court should grant certiorari to issue an advisory opinion on whether to borrow the state statute of limitations for breach of contract for a claim under ERISA section 510 (29 U.S.C. § 1140), where petitioner's claim is barred in any event by the California two-year statute of limitations for oral contracts.

LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

Lynn Ann Kim was plaintiff and appellant in the courts below. Respondent Pacific Bell Telephone Company (named in the petition as "Pacific Bell") was a defendant and appellee in the courts below. Pacific Bell's Disability Assistance Plan, Pacific Telesis Group Comprehensive Disability Benefits Plan, and General Employees' Benefits Committee were also defendants and appellees in the courts below.

Pacific Bell Telephone Company is a corporation, wholly owned by Pacific Telesis Group. SBC Communications, Inc. is a publicly held company, and is the parent company of Pacific Telesis Group.

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RESPONDENT'S BRIEF IN OPPOSITION

This petition raises a non-justiciable, abstract question of law which will not affect the untimeliness of petitioner's claim. The petition omitted mention of the district court's September 20, 1999 order granting summary judgment dismissing petitioner's fifth cause of action for breach of employment contract as untimely—the issue deferred for further briefing in the district court's initial order (Pet. 14b-17b). In the final order, the district court ruled that petitioner's employment contract was oral, and the appropriate California statute of limitations is two years. Petitioner did not contest that ruling in her appeal to the U.S. Court of Appeals for the Ninth Circuit. Petitioner filed her claim under section 510 of the Employee Retirement Income Security Act ("ERISA", 29 U.S.C. section 1140) on September 8, 1998, over two years after her October 16, 1995 termination.

Petitioner now seeks review in this Court on the theory that there is a conflict among the circuit courts about whether to apply a wrongful termination or a breach of contract statute of limitations to an ERISA section 510 claim. The petition should be denied because the applicable statute of limitations for breach of an oral contract would bar plaintiff's claim in any event.

A. This Petition Does Not Present a Justiciable Question.

Decision of whether breach of contract or wrongful termination provides the most analogous state-law limitations period for an ERISA section 510 claim cannot affect the rights of petitioner in this case.

1. The factual premise for the petition was waived.

Petitioner waived any claim that her employment was based on a written contract by failing to appeal the district court's adverse findings on her breach of contract claim. The district court determined that petitioner's claim for breach of an implied employment contract did not relate back to her original complaint. Pet. 14b-15b. Petitioner's claim for violation of ERISA section 510, like the breach of implied contract claim, was not filed until September 8, 1998. Pet. 13b, 14b.

In the order granting summary judgment to respondent, the district court found that petitioner's breach of implied contract claim was not based on any writing, and was therefore barred by the two year limit for actions on an oral contract. Calif. Code of Civ. Proc., section 339. Petitioner did not raise the dismissal of that contract claim here or in her appeal to the Ninth Circuit. Pet. 7, n. 2, Pet. 2a.

Petitioner argues that her action would be timely under the four-year limitation period permitted in California for contract actions (Calif. Code of Civ. Proc., section 337). Pet. 9. However, the petition fails to set out verbatim the statute. That statute, by its terms, only applies to any contract "founded upon an instrument in writing". Calif. Code of Civ. Proc., section 337(1). Petitioner's failure to appeal the district court's order, determining that petitioner's employment contract was not founded upon a writing, precludes petitioner's argument.

2. The petition presents no claim for relief.

Petitioner's claim for violation of ERISA section 510 is untimely, regardless of whether the appropriate statute of limitations is for wrongful termination or breach of contract. If the Ninth Circuit should not have applied the California statute of limitations for wrongful termination under *Burrey v. Pacific Gas and Elec. Co.*, 159 F.3d 388, 396-97 (9th Cir. 1998), then the two-year statute of limitations for breach of an oral contract would apply to bar petitioner's claim. See,

Hinton v. Pacific Enterprises, 5 F.3d 391, 394 (9th Cir. 1993), cert. denied, 511 U.S. 1083 (1994).

The facts of this case make the question posed by petitioner one "which cannot affect the matter in issue" and thus outside the function of this Court. *Oil Workers v. Missouri*, 361 U.S. 363, 367-68 (1960). If petitioner had been employed under a written employment agreement, then the petition would present "a real and substantial controversy admitting of specific relief," but this Court does not have the power to render "an opinion advising what the law would be upon a hypothetical state of facts." *North Carolina v. Rice*, 404 U.S. 244, 246 (1971), quoting *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 241 (1937).

B. Petitioner's Purported Conflict Between Circuits Does Not In Any Event Justify Review.

Even if petitioner's purported question were justiciable, it would not warrant review by this Court.

1. The Eleventh Circuit does not apply breach of contract limitations to section 510 claims.

Petitioner erroneously asserts that the Eleventh Circuit analogizes an ERISA section 510 claim to a contract claim when selecting the appropriate state statute of limitations. Pet. 12-13. Consistent rulings of that court expressly reject use of statutes of limitations periods for contract actions, and adopt state statutes for retaliatory discharge or wage claims. *Musick v. Goodyear Tire & Rubber Co., Inc.*, 81 F.3d 136, 138-39 (11th Cir.), *cert. denied,* 519 U.S. 965 (1996), and cases there cited. Thus, the Eleventh Circuit is aligned with the Ninth Circuit in choosing retaliatory discharge or wrongful termination statutes of limitations, and rejecting general statutes of limitations governing contract actions.

2. The *Heideman* case does not indicate a serious conflict among the circuits.

Petitioner's claim of a conflict among the circuits is left relying only on *Heideman v. PFL, Inc.*, 904 F.2d 1262, 1267 (8th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991). Pet. 10.

This case does not show a serious circuit conflict. In the eleven years since *Heideman*, no reported decision has followed it to "borrow" a state contract statute of limitations for an ERISA section 510 claim.

Moreover, the Eighth Circuit in *Heideman* borrowed the contract limitations period "without analysis, ... allocating only one sentence to the issue of which limitations statute properly applied." *McClure v. Zoecon, Inc.*, 936 F.2d 777, 779 (5th Cir. 1991). Indeed, there is no indication that the question of how to properly characterize a section 510 action—as a contract claim or otherwise—was even contested in *Heideman*, since the plaintiff's claim was untimely even under Tennessee's six-year period for breach of contract. *Heideman v. PFL, Inc.*, *supra*, 904 F.2d at 1267. This 11-year-old variant from the consistent approach of the federal courts in determining the limitations period for a section 510 action provides no need for review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 01-380

In The
Supreme Court
of the
United States

LYNN ANN KIM,
Petitioner,
vs.
PACIFIC BELL, a Corporation,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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I.

THIS PETITION PRESENTS A JUSTICIABLE QUESTION

Respondent asserts that this Court should deny the Petition because it presents a non-justiciable question. Respondent bases this contention on the theory that even assuming a contract statute of limitations applies to Petitioner's ERISA section 510 claim, her claim is still untimely because the district court found Petitioner's employment contract was oral, and oral contracts in California are governed by a two-year limitations period. Respondent is mistaken because its argument is based on a false premise.

Petitioner's section 510 claim is not based on her employment contract. Rather, Petitioner's section 510 claim is based on respondent's alleged interference with her ERISA-protected rights to service retirement credits under the company's Pension Plan, which the district court affirmed is a written document. (Pet. App. 12b-13b.)

The District Court acknowledged that if the correct statute of limitations is four years, Petitioner's claim would be timely, but ultimately found that the one-year statute of limitations for wrongful termination set forth in California's Code of Civil Procedure section 340, subdivision (3) applied. (Pet. App. 13b.) This ruling was appealed to the Ninth Circuit and affirmed. (Pet.App. 2a-3a.) Significantly, while respondent argued in both the district court and the appellate court that an ERISA section 510 claim was more analogous to a wrongful termination action than to a contract action, it never argued, as it does here, that if a contract limitations period applied, it would be the two year limitations period for oral contracts rather than the four year statute for written contracts.

Therefore, Petitioner's contention that her section 510 claim is subject to a four-year statute of limitations was raised and preserved in both the district court and in the Court of Appeal. Conversely, Respondent's claim that if a contract limitations period applies, it is the two year period for oral contracts rather than the four year period for written contracts, was never raised anywhere prior to

its Brief in Opposition in this Court. Accordingly, the issue is properly before this Court.

II.

THE EXISTING CONFLICT BETWEEN THE CIRCUITS JUSTIFIES REVIEW BY THIS COURT

Respondent attempts to minimize the importance of the issue presented here by characterizing the split among the circuits as not a "serious conflict" worthy of this Court's consideration. Again, respondent is mistaken. *Heideman v. PFL, Inc.* (8th Cir. 1990) 904 F.2d 1262, *cert. denied* 498 U.S. 1026, 111 S.Ct. 676, 112 L.Ed.2d 668 (1991), holding that Tennessee's six year statute of limitations for contract actions applies to ERISA section 510 claims, has not been overruled and is still good law. Moreover, several courts have recognized that the circuits have reached "disparate conclusions" and a "lack of consensus" as to this issue, possibly because section 510 recognizes and provides remedies for several different types of rights, which, individually, may be analogous to more than one state statute. (See *Sandberg v. KPMG Peat Marwick, LLP* (2nd Cir. 1997) 111 F.3d 331, 334, *Teumer v. General Motors Corp.* (7th Cir. 1994) 34 F.3d 542, 544-546 and cases cited therein.)

As is set forth fully in the Petition, when considering ERISA section 510 claims, the circuits have variously applied state statutes of limitations for wrongful termination, retaliatory discharge, employment discrimination, contract actions and violations of statutory rights. Accordingly, review by this Court is necessary and appropriate to settle this important question and to ensure uniformity of decision.

Respectfully submitted,

DATED: October 10, 2001

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